

**WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP**

*Attorneys for Defendant*

**BUBBY'S PIE CO, INC.**

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**File No.: 14148.00227**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X  
BRIAN FISCHLER, on behalf of himself and all others      Index No.: 1:18-cv-10945  
similarly situated,

Plaintiff,

-against-

**DEFENDANT'S ANSWER TO THE  
COMPLAINT WITH AFFIRMATIVE  
DEFENSES AND JURY DEMAND**

BUBBY'S PIE CO, INC.

Defendants.  
----- X

**ANSWER OF DEFENDANT WITH AFFIRMATIVE DEFENSES**

Defendant BUBBY'S PIE CO, INC, hereinafter ("Defendant"), by their attorneys, Wilson Elser Moskowitz Edelman & Dicker LLP, respectfully answers the Complaint of the Plaintiff as follows:

**AS TO INTRODUCTION**

1. Defendant denies the allegations contained in paragraph "1" of the Complaint.
2. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph "2" of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.
3. Defendant denies the allegations contained in paragraph "3" of the Complaint.

**PARTIES**

4. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “4” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

5. Defendant admits allegations contained in paragraph “5” of the Complaint to the extent that it is a corporation organized under the laws of New York.

**JURISDICTION AND VENUE**

6. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “6” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

7. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “7” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

8. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

9. Paragraph “9” of the Complaint is a statement that does not require admission or denial and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

**NATURE OF ACTION**

10. Paragraph “10” of the Complaint is a statement that does not require admission or denial and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

11. Paragraph “11” of the Complaint is a statement that does not require admission or denial and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

12. Paragraph “12” of the Complaint is a statement that does not require admission or denial and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

13. Paragraph “13” of the Complaint is a statement that does not require admission or denial and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

**FACTUAL ALLEGATIONS**

14. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “14” of the Complaint.

15. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “15” of the Complaint.

16. Defendant denies the allegations contained in paragraph “16” of the Complaint that the website is inaccessible

17. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “17” of the Complaint.

18. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “18” of the Complaint. Defendant denies the remaining allegations contained in paragraph “18” of the Complaint.

19. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “19” of the Complaint. Defendant denies the remaining allegations contained in paragraph “19” of the Complaint.

20. Defendant denies the allegations contained in paragraph “20” of the Complaint.

21. Defendant denies the allegations contained in paragraph “21” of the Complaint.

22. Defendant denies the allegations contained in paragraph “22” of the Complaint.

23. Defendant denies the allegations contained in paragraph “23” of the Complaint.

24. Defendant denies the allegations contained in paragraph “24” of the Complaint.

25. Defendant neither admits nor denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “25” of the Complaint, and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect. and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

26. Defendant denies the allegations contained in paragraph “26” of the Complaint.

27. Defendant denies the allegations contained in paragraph “27” of the Complaint.

28. Defendant denies the allegations contained in paragraph “28” of the Complaint.

29. Defendant denies the allegations contained in paragraph “29” of the Complaint.

30. Defendant denies the allegations contained in paragraph “30” of the Complaint.

**CLASS ACTION ALLEGATIONS**

31. Defendant denies the allegations contained in paragraph “31” of the Complaint, and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

32. Paragraph “32” of the Complaint is a statement that does not require admission or denial. Defendant otherwise denies the allegations contained in paragraph “32” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

33. Paragraph “33” of the Complaint is a statement that does not require admission or denial. Defendant otherwise denies the allegations contained in paragraph “33” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

34. Defendant denies the allegations contained in paragraph “34” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

35. Defendant denies the allegations contained in paragraph “35” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

36. Defendant denies the allegations contained in paragraph “36” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

37. Defendant denies the allegations contained in paragraph “37” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

38. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “38” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

### **FIRST CAUSE OF ACTION**

39. In response to paragraph “39”, defendants repeat and reallege each admission or denial made in response to paragraphs “1” through “38” with the same force and effect as if more fully stated at length herein.

40. Paragraph “40” of the Complaint is a statement that does not require admission or denial.

41. Defendant denies the allegations contained in paragraph “41” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

42. Paragraph “42” of the Complaint is a statement that does not require admission or denial.

43. Paragraph “43” of the Complaint is a statement that does not require admission or denial.

44. Paragraph “44” of the Complaint is a statement that does not require admission or denial.

45. Defendant denies the allegations contained in paragraph “45” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

46. Paragraph “46” of the Complaint is a statement that does not require admission or denial.

### **SECOND CAUSE OF ACTION**

47. In response to paragraph “47”, defendants repeat and reallege each admission or denial made in response to paragraphs “1” through “46” with the same force and effect as if more fully stated at length herein.

48. Paragraph “48” of the Complaint is a statement that does not require admission or denial.

49. Defendant denies the allegations contained in paragraph “49” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

50. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “50” of the Complaint, and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

51. Defendant denies the allegations contained in paragraph “51” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

52. Paragraph “52” of the Complaint is a statement that does not require admission or denial.

53. Paragraph “53” of the Complaint is a statement that does not require admission or denial.

54. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph “54” of the Complaint.

55. Defendant denies the allegations contained in paragraph “55” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

56. Defendant denies the allegations contained in paragraph “56” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect

57. Defendant denies the allegations contained in paragraph “57” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

58. Defendant denies the allegations contained in paragraph “58” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

59. Defendant denies the allegations contained in paragraph “59” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

60. Paragraph “60” of the Complaint is a statement that does not require admission or denial.



**THIRD CAUSE OF ACTION**

61. In response to paragraph “61”, defendants repeat and reallege each admission or denial made in response to paragraphs “1” through “60” with the same force and effect as if more fully stated at length herein.

62. Paragraph “62” of the Complaint is a statement that does not require admission or denial.

63. Defendant denies the allegations contained in paragraph “63” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

64. Defendant denies the allegations contained in paragraph “64” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

65. Defendant denies the allegations contained in paragraph “65” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

66. Defendant denies the allegations contained in paragraph “66” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

67. Defendant denies the allegations contained in paragraph “67” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

68. Defendant denies the allegations contained in paragraph “68” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

69. Defendant denies the allegations contained in paragraph “69” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

70. Defendant denies the allegations contained in paragraph “70” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

71. Defendant denies the allegations contained in paragraph “71” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

72. Paragraph “72” of the Complaint is a statement that does not require admission or denial.

#### **FOURTH CAUSE OF ACTION**

73. In response to paragraph “73”, defendants repeat and reallege each admission or denial made in response to paragraphs “1” through “72” with the same force and effect as if more fully stated at length herein.

74. Defendant denies the allegations contained in paragraph “74” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

75. Defendant denies the allegations contained in paragraph “75” of the Complaint.

**PRAYER FOR RELIEF**

76. Defendant denies the allegations contained in paragraph “76” of the Complaint and respectfully refer all questions of law to this Honorable Court at the time of trial for their true meaning, interpretation and legal effect.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

77. Upon information and belief, the plaintiff lacks the requisite standing under the Americans with Disability Act (“ADA”) to maintain this cause of action.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

78. Any alleged violations do not affect the Plaintiff’s alleged disability.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

79. The Plaintiff has failed to allege a plausible intention or desire to return to the Defendant’s website, or that he would have returned if not for the alleged barrier.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

80. Upon information and belief, the Plaintiff lacks standing as he is a serial ADA litigant who has and continues to pursue a course of vexatious litigation against this and other similarly situated defendants for the purpose of recovery attorney’s fees under the ADA.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

81. The website is not subject to the rules and regulations promulgated within the ADA. The internet is not a “place of public accommodation”.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

82. Removal of the alleged barriers and/or alternative access requirements with respect to the website would cause an undue hardship and/or are not readily achievable and are thus not required.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

83. Plaintiff could not, even with the alleged reasonable accommodation, enjoy the right in question.

**AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE**

84. The Complaint fails to state a claim upon which relief may be granted.

**AS AND FOR A NINTH AFFIRMATIVE DEFENSE**

85. Plaintiff's claims are barred from recovery, in whole or in part, as Plaintiff has suffered no damages.

**AS AND FOR A TENTH AFFIRMATIVE DEFENSE**

86. Plaintiff's claims are barred by the doctrine of laches.

**AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE**

87. Plaintiff's claims are barred by the doctrine of estoppel.

**AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE**

88. Plaintiff's claims are barred by the doctrine of waiver.

**AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE**

89. Plaintiff's damages, if any, were caused by individuals and entities other than Defendants, over which Defendants had no control.

**DEMAND FOR TRIAL BY JURY**

**WHEREFORE**, Defendant, BUBBY'S PIE CO, INC., demands a trial by jury for all claims and issues in this action for which these defendants are or may be entitled to a jury trial.

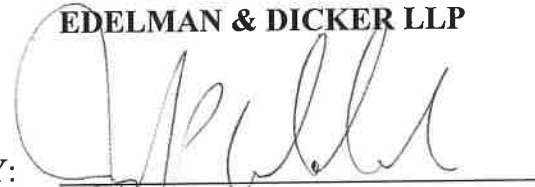
**WHEREFORE**, Defendant, BUBBY'S PIE CO, INC., demands judgment dismissing the Complaint as against it with prejudice in its entirety, together with costs and disbursements,

and such other relief as the Court deems just and proper.

Dated: White Plains, New York  
February 12, 2019

**WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP**

BY:

A handwritten signature in dark ink, appearing to read 'J. Morio', is written over a horizontal line.

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